Supreme Court, U.S.
FILED

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No. 02-

IN THE

Supreme Court of the United States

R. SCOTT HUTSON,

Petitioner,

v.

RENT-A-CENTER, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fair Labor Standards Act guarantees hourly employees overtime compensation for hours worked in excess of forty (40) hours weekly. The Motor Carrier Act, the ancestor statute of the Interstate Commerce Commission and the Department of Transportation, regulates all employees, including those otherwise subject to the Fair Labor Standards Act (including employees' claims for overtime compensation) if the employees are sufficiently involved in transportation activities to bring them under the jurisdiction of the Secretary of Transportation. The Motor Carrier Act, however, has never been interpreted, by case law precedent of this Court or by statutory enactment, to include jurisdiction over "private motor carriers not primarily involved in transportation".

The employer, Rent-A-Center, uses hourly employees, more than 6,500 of whom nationwide transport appliances, furniture and electronic equipment as an incidental part of the business of the employer. As a "private motor carrier" not primarily engaged in the transportation business, the employer is not excluded from the requirement to pay overtime compensation to hourly employees working over 40 hours a week.

The question presented is whether such a "private motor carrier" is covered by the MCA and is therefore subject to the jurisdiction of the Secretary of Transportation so that it does not have to pay overtime compensation to employees, or whether it is not subject to the jurisdiction of the transportation agency and is therefore required to pay overtime to eligible workers pursuant to the terms of the FLSA.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The District Court's order by Judge Lawson (Appendix B 7a-21a) has not been published. The court of appeals opinion (Appendix A 1a-5a) affirming the grant of summary judgment to the Respondent (Per Curiam, Circuit Judges Carnes, Hull and Marcus) has not yet been published. The court of appeals' order denying rehearing and rehearing en banc (Appendix C 22a-23a), denying the stay of mandate is not published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on May 21, 2002, and denied rehearing and rehearing en banc on July 19, 2002. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of 29 U.S.C. § 213(b)(1)[1] are relevant to this petition.

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1. (b) Maximum hour requirements: The provisions of section 207 of this title shall not apply with respect to —

> (1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49 . . .

The other statute which must be contrasted and compared to the foregoing provisions is 49 U.S.C. § 13505[2]

STATEMENT OF THE CASE

The facts as set forth in the district court's order and incorporated into the opinion of the court of appeals (Appendix A 3a-4a) are accepted by the Petitioner as sufficiently descriptive of the circumstances which give rise to the issues presented to this Court.

The district court granted summary judgment to the employer while finding that the employer is a "motor private carrier" which is primarily engaged in a business other than transportation.

The Eleventh Circuit Court of Appeals affirmed the district court but without referring directly to whether the employer was a "private motor carrier" but instead holding only that the employer was a "motor carrier" (Appendix A 4a) and was exempt from the obligation to pay employees such as the Petitioner overtime compensation because his duties involved some transportation responsibilities.

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2. (a) In General. — Neither the Secretary nor the Board has jurisdiction under this part over the transportation of property by motor vehicle when —

(1) the property is transported by a person engaged in a business other than transportation; and (2) the transportation is within the scope of, and furthers a primary business (other than transportation) of the person.

A Petition for Rehearing and Rehearing En Banc was denied on July 19, 2002 (Appendix C 22a-23a).

This petition for a writ of certiorari followed.

SUMMARY OF THE ARGUMENT

The hourly employee in this case worked more than 40 hours a week for the employer, sometimes performing transportation duties by hauling furniture and appliances to the homes of customers. As such, he worked for a "private motor carrier" which is not regulated by the Secretary of Transportation, 49 U.S.C. § 13505.

The employer defended this action by moving for summary judgment based on the case of *Klitzke v. Steiner Corporation*, 110 F.3d 1465 (9th Cir. 1997). The Petitioner distinguished *Klitzke*, but the district court ruled that employers such as the private carrier employer in this case were nonetheless subject to DOT regulation and, consequently, did not have to pay overtime to workers.

The district court abused its discretion by ruling, without evidence, that the amendment to convert the case to a class action would produce "undue prejudice" to the employer. There was no "undue delay" in filing the proposed amendment.

The court of appeals had cited to it the case of *Brooks Transp. Co., Inc. v. United States*, 93 F. Supp. 517 (E.D. Va. 1950), *aff'd*, 340 U.S. 925, 71 S. Ct. 501, 95 L. Ed. 668 (1951), and the clear and unambiguous language of the modern statute governing nonregulation by the DOT of private motor carriers like the employer, 49 U.S.C. § 13505. The court of appeals failed to address the argument.

The precedents of this Court, the statutory language of § 13505, and the refusal of the lower courts to follow the law in this matter, which is clear and plain, require the granting of Petitioner's writ of certiorari.

ARGUMENT

I. This Court has ruled that a "private motor carrier" involved in transportation incidental to its primary business (not transportation) is not subject to regulation pursuant to the Motor Carrier Act.

In 1935 the Motor Carrier Act, 49 U.S.C. § 13501, was enacted into law. It established requirements for safety in transportation and regulated, among other things, the burgeoning surface road commerce of the United States. In 1938 a second piece of important legislation which impacts this case was enacted, the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, providing for a "minimum wage" and requiring overtime pay for work in excess of 40 hours a week.

The possibility of conflicting provisions of these two major legislative enactments affecting the same persons occurred to the Congress, and a provision was incorporated into the F.L.S.A. that any workers covered by the M.C.A. would not be covered by the overtime provisions of the Act, Section 13(b)(1).

Shortly after the enactment of these two significant legislative influences on the culture and commerce of our nation, the agency charged with enforcing the Motor Carrier Act, the Interstate Commerce Commission, began to have difficulty deciding if coverage of the M.C.A. occurred in certain cases, and, if it did not, what constituted the standard

for making the distinction. The I.C.C. came to the conclusion that "private motor carriers" which were not primarily involved in the business of transportation of products, but which needed to move items from place to place to further their main business, were exempt from the regulations of the M.C.A.

This Court considered the matter and agreed, in *Brooks Transp. Co., Inc. v. United States*, 93 F. Supp. 517 (E.D. Va. 1950), *aff'd*, 340 U.S. 925, 71 S. Ct. 501, 95 L. Ed. 668 (1951), more than a half a century ago. Some years later this Court again stated that an exception to coverage of the "Interstate Commerce Act" existed when the carrier transported property in furtherance of a primary business enterprise "other than transportation", *Red Ball Motor Freight, Inc. v. Shannon*, 377 U.S. 311, 312, 84 S. Ct. 1260 (1964).

II. The United States Code incorporated this Court's holding into statutory provisions.

The holding that the I.C.C. had no enforcement power over private motor carriers transporting products in furtherance of their primary business, which was not transportation services, was eventually reduced to black letter law in 1958, 49 U.S.C.A. § 10524 (recodified as § 13505) and, as such, defined "exempt private carriage".

If a change in the M.C.A. had not occurred in 1966 matters may have stayed the same. But, as stated by the Third Circuit, "In 1966, Congress transferred the authority to regulate under . . . the MCA from the ICC to the DOT", *Freidrich v. U.S. Computer Services*, 974 F.2d 409 (3d Cir. 1992). At the same time, 29 U.S.C. § 213(b)(1) had one

significant change in its language, the first since 1938. In 1966 the jurisdiction over employees who were exempt from overtime compensation because of the primacy of the Motor Carrier Act was changed from the original grant of authority to the "Interstate Commerce Commission" to the "Secretary of Transportation".

A problem had been created. Although the portion of the F.L.S.A. exempting employees from overtime pay if subject to the "Department of Transportation" jurisdiction had been changed from I.C.C. to Secretary of Transportation, the corresponding portion of the M.C.A. had been left unchanged. 49 U.S.C.A. § 10524 still read that the "Interstate Commerce Commission" had no jurisdiction over "exempt private carriage".

The Third Circuit, in *Freidrich*, *supra*, took the unfortunate position that since the Secretary of Transportation had been given exclusive jurisdiction of transportation employees by virtue of 29 U.S.C.A. § 213(b)(1), and while the provisions of 49 U.S.C.A. § 10524 only excluded the Interstate Commerce Commission from supervisory responsibility of private motor carriers and their employees transporting goods in furtherance of primarily non-transportation industry, then the Secretary of Transportation had more and broader jurisdiction that covered more areas than that assigned to the I.C.C. and, therefore, the "exemption" of private motor carriers from the M.C.A. did not apply to the DOT, only the ICC.

The Eleventh Circuit, almost ten years earlier, had come to a contrary conclusion in *Ryder Truck Lines, Inc. v. U.S. & I.C.C.*, 716 F.2d 1369, at 1372 (11th C.A. 1983), when it found that the M.C.A. "regulates only 'common' or 'contract'

carriers", p. 1372, without creating a distinction based on what was likely a legislative oversight. Still earlier the Eleventh Circuit had found exempt carrier activity in the case of *American Trucking Association, Inc., and Georgia Motor Trucking Association, Inc. v. Interstate Commerce Commission, et al.*, 672 F.2d 850, at 851 (11th C.A. 1982). *Also see United States v. Drum*, 368 U.S. at 374-76, 82 S. Ct. at 410-11.

However, the *Ryder* case did not involve the F.L.S.A. and its interplay with the Motor Carrier Act. Perhaps that makes some difference. Still, if the Secretary of Transportation had no jurisdiction over private motor carriers not primarily involved in the transportation industries, should not the overtime pay exclusion be meaningless since only employees subject to regulation by the M.C.A. would be covered?

The *Friedrich* case, however, became the cornerstone for another case which originally formed the basis for the motion for summary judgment filed in the District Court in this matter. In 1997 the Ninth Circuit decided *Klitzke v. Steiner Corporation*, 110 F.3d 1465 (9th Cir. 1997). Although the statutory basis for the Ninth Circuit's ruling concerning 49 U.S.C.A. § 10524 had, at the time of the opinion, been changed, the case arose from a claim for overtime compensation in 1993 and 1994, p. 1467, prior to the statutory change. (In fact, as a result of the statutory change, the law reverted to its pre-*Freidrich* status.)

The change was that § 10524 became revised § 13505 of Title 49. The substantive change occurred since the Interstate Commerce Commission had been "terminated" by the ICC Termination Act of 1995, and the old language of

§ 10524 now had to be changed since references to the ICC were invalid. On December 31, 1995, the Interstate Commerce Commission ended its existence and the language in the statute impacting overtime compensation, as used in *Freidrich* and *Klitzke* to hold no exemption from DOT jurisdiction existed, likewise ended.

Now the new § 13505 said expressly that (primarily nontransportation) private motor carriers were exempted from coverage by the "Secretary of Transportation" under the M.C.A. The rationale in *Klitzke*, *supra*, at p. 1467, that the overtime exemption did not exist for employees who had some transportation duties in their jobs for a business not primarily involved in interstate transportation of goods, was that 49 U.S.C. § 10524 "did not provide an exemption from regulation by the *Secretary of Transportation*". (Underlining supplied).

Now, obviously, since 1996, the revised statute did provide just such an exemption. So, the whole journey by the Third and Ninth Circuit had been brought back to square one with the amended language of Section 13505 beginning January 1, 1996. Although it could be argued that those cases were erroneously decided, it is not necessary to do so since the basis of their ruling on § 10524 is moot, with the substitution of the new "exemption" language applicable to the Department of Transportation and the Secretary of Transportation in § 13505.

Yet, as mentioned, that was the basis of the employer's summary judgment motion in this case. The district court apparently wanted to reach a result which would not include the employees of the "lease-to-own" business in the category of "overtime" eligible workers under the protection of the

F.L.S.A. In order to do so, however, the argument put forward by the employer that the "Klitzke rule" was applicable did not suit the court's rationale, perhaps for the reasons detailed above. In any event the District Court never even cited the *Klitzke* case in its opinion. Instead, it used a different analysis.

III. The district court held that the claim of Petitioner that the DOT did not regulate the employer because it was an exempt entity was "unfounded and not supported by any case law".

The district court recounted that the F.L.S.A. allows an exemption for workers subject to the regulatory powers of the Secretary of Transportation, § 13(b)(1). The court also found that the employer was a motor carrier, and that the activities of employees, such as the Plaintiff, affected highway safety and involved the transportation of goods in interstate commerce.

The findings of the court as stated in the preceding paragraph is a correct, albeit foreshortened version, of the law with its primary shortcoming being its refusal to accept the "exemption" of private motor carriers from the coverage of the MCA if the carriers are using transportation of products to further a nontransportation business. The Klitzke rule, the basis of the summary judgment motion of the employer, is not even mentioned.

The argument of the Petitioner that the employer is a "private motor carrier" not primarily involved in the business of transportation but using vehicles to transport product to customers as an incidental, and unpaid, portion of the business of leasing/selling furniture and appliances, and, as such, is covered by 49 U.S.C.A. § 13505 is likewise given

short shrift. One mention of the Plaintiff's contentions in this area is made in the district court's order. A footnote concludes that "[t]his argument is unfounded and not supported by any case law", p. 7 of Order (Appendix B 16a-17a).

The district court is saying that the statutory meaning of § 13505 is that a private motor carrier "that was not primarily involved in transportation" is not exempt from the DOT regulations and does not owe overtime compensation to hourly employees. Likewise to the cases cited above when it finds that the exemption argument is "not supported by any case law".

The court of appeals reviewed the lower court's order and affirmed. The Eleventh Circuit set forth the facts as found by the district court which clearly shows that the employer is a private motor carrier engaging in transportation of its products as an incidental part of its business (Appendix A 3a). Yet, no mention is made of 49 U.S.C. § 13505 or of the cases cited to the court of appeals, the same as those cited to this Court as part of this Petition.

One case dealing with motor carriers, *Baez v. Wells Fargo Armored Service Corp.*, 938 F.2d 180, at 182 (1991), is a case involving a "motor contract carrier" clearly subject to the regulatory authority of the DOT, not a private motor carrier. No case is cited by the court of appeals dealing with the issue presented to the court by the Petitioner. The statutory provision is not even mentioned in the opinion. The court of appeals does not even mention the footnote of the district court that the Petitioner's argument is unsound and unsupported. It ignores it.

IV. The amendment of the Petitioner was denied without adequate reason and constitutes an abuse of discretion.

The district court found that "undue prejudice" would result to the employer from the maintenance of a class action on behalf of employees similarly situated in terms of overtime compensation claims such as those asserted by the Petitioner. No evidence was produced; merely a conclusion on the part of the lower court.

The court of appeals affirmed (Appendix A 2a). The Petitioner should be allowed to pursue an adequate remedy against the employer if he should prevail as a class representative.

REASONS FOR GRANTING THE PETITION

The Petitioner put forth a reasoned and compelling argument as to why he should receive overtime compensation despite the attempt by the employer to characterize him as a transportation worker subject to the regulatory authority of the DOT and, therefore, not able to claim overtime pay. The district court departed from the precedents of this Court, from the plain meaning of federal statutory provisions, and pronounced the position of the Petitioner unsound and invalid. It found that the employer was not primarily engaged in transportation activities, and that the employer was a "motor private carrier", yet ignored the cases and the statute which mandate a finding that the DOT does not regulate such entities and that the overtime compensation claims of the Petitioner were meritorious.

The court of appeals departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the district court as to call for the exercise of this Court's supervisory power. The authority of this Court's prior decisions has been challenged by the holdings in this case.

A question of federal law, the interpretation of 49 U.S.C. § 13505, by the lower courts conflicts with relevant decisions of this Court and flies in the face of a genuine understanding of the statutory basis of this law and its case law antecedents, again, by this Court. The statute is not hard to comprehend, but the meaning of the law is being ignored or misinterpreted by the decisions below.

More than the question of the number of affected employees of this one company, of the large amount of monetary damages owed to such employees for overtime compensation, and of the numerous employees of other companies which are affected, is one overriding concern — the lower court decisions are offensive to a system of laws. "Jurisprudence" is not just a word, it is a majestic word with significant promises and guarantees. Every citizen should be given fair consideration under our system of laws. The Petitioner has been denied such treatment by the decisions below.

The decisions below are offensive to "fairness", to stare decisis, and to the plain meaning of statutory law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MAY 21, 2002

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 01-17261
Non-Argument Calendar

D. C. Docket No. 00-00198-CV-2-HL-4

R. SCOTT HUTSON,

Plaintiff-Appellant,

versus

RENT-A-CENTER, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(May 21, 2002)

Before CARNES, HULL, and MARCUS, Circuit Judges.

PER CURIAM:

R. Scott Hutson appeals the district court's entry of summary judgment in favor of his former employer, Rent-A-Center, Inc., in this action alleging violations of the

overtime pay provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"). Hutson argues that the district court erred by concluding that Hutson was exempt from the FLSA's overtime provisions, pursuant to 29 U.S.C. § 213.[1]

We review the district court's order granting summary judgment *de novo. See Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1296 (11th Cir. 2000). A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

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1. Hutson also argues that the district court erred by denying his motion to amend his complaint. In his motion to amend, Hutson sought to convert his action into a class action with himself as the representative of a class, which he proposed would consist of "account managers." The district court denied the motion, finding that the motion was untimely because: (1) it was filed 10 months after the original complaint; (2) discovery had closed two months beforehand; and (3) Rent-A-Center's motion for summary judgment had already been pending for one month. The district court also observed that the "Amended Complaint does not allege a new cause of action or reflect any newly discovered facts revealed during the course of discovery which might warrant an amendment," and that due to the late date of the motion to amend, Rent-A-Center would suffer undue prejudice because none of Rent-A-Center's discovery efforts were designed to defend against a class action. We can find no abuse of discretion in the district court denial of Hutson's untimely motion to amend his complaint. *See Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001) (reviewing denial of motion to amend complaint for abuse of discretion).

Appendix A

Upon thorough review of the record, as well as careful consideration of the parties' briefs, we find no reversible error and affirm.

Prior to granting Rent-A-Center's motion for summary judgment, the district court summarized following undisputed facts:

> Rent-A-Center operates stores throughout the United States, including stores in Georgia and Alabama. Rent-A-Center rents merchandise, which it owns, to customers on a rent-to-own basis. The merchandise comes from existing stock or through its merchandise catalog. When merchandise is ordered from the catalog, it is shipped directly to the store from a vendor, almost all of which are located almost exclusively outside the state of Georgia. The merchandise is delivered by Rent-A-Center employees in Rent-A-Center trucks to customers in Georgia and Alabama.
>
> Plaintiff, Scott Hutson, was employed by Rent-A-Center in Columbus, Georgia from March 1998 to February 2001. The stores at which Plaintiff worked had customers in Georgia and Alabama. Plaintiff was hired as an Account Manager. As an Account Manager, Plaintiff spent a substantial portion of his time transporting furniture and appliances to the homes of customers of the Defendant's "rent to own" business. Plaintiff received a promotion and became an "Inside Outside Manager" from October 16, 1999

> until February 3, 2000. Plaintiff testified that as an Inside Outside Manager, he still made deliveries "on average about twice . . . a week." Plaintiff resumed his "Account Manager" position on February 3, 2000.
>
> On November 13, 2000, Plaintiff sued Rent-A-Center alleging violations of the overtime pay provisions of the Fair Labor Standards Act ("FLSA").

(internal quotation marks and citations omitted). In his complaint, Hutson alleged that he was entitled to receive overtime pay for each week in which he worked more than forty hours, pursuant to 29 U.S.C. §§ 206, 207.

On these facts, the district court properly concluded that: (1) Rent-A-Center is a motor carrier; (2) Hutson's duties affect highway safety; and (3) Hutson's activities involve the interstate transportation of goods. Accordingly, the district court held that Hutson was exempt from the overtime provisions of the FLSA, and that summary judgment was therefore appropriate. *See* 29 U.S.C. § 213(b)(1) (providing that an employee is exempt if he is an "employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of § 31502 of Title 49"); *Baez v. Wells Fargo Armored Serv. Corp.*, 938 F.2d 180, 181-82 (11th Cir. 1991) (citing 29 C.F.R. § 782.2(a), which provides that the Secretary of Transportation has authority over employees of carriers who transport property and passengers in interstate commerce); *see also Levinson v. Spector Motor Serv.*, 330

U.S. 649, 671-72, 67 S. Ct. 931, 942-43, 91 L. Ed. 1158 (1947) (approving Interstate Commerce Commission's conclusion of law that the motor carrier exemption governs certain employees involved in transportation of passengers and property in interstate or foreign commerce). We can discern no error in the district court's analysis or conclusion and accordingly affirm.[2]

AFFIRMED.

2. We grant Hutson's motion to file his reply brief out of time.

Appendix A

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 01-17261

District Court Docket No.
00-00198-CV-2-HL-4

R. SCOTT HUTSON,

Plaintiff-Appellant,

versus

RENT-A-CENTER, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: May 21, 2002
For the Court: Thomas K. Kahn, Clerk
By: Eggleston, Nataki

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, COLUMBUS DIVISION DATED AND FILED DECEMBER 11, 2001 AND ENTERED DECEMBER 13, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA COLUMBUS DIVISION

Civil Action No. 4:00-CV-198(HL)

R. SCOTT HUTSON,

Plaintiff,

v.

RENT-A-CENTER, INC.,

Defendant.

ORDER

Before the Court is Defendant's Motion for Summary Judgment (Tab #10) and Plaintiff's Motion to Allow Amendment (Tab #15).

I. FINDINGS OF FACT

Rent-A-Center operates stores throughout the United States, including stores in Georgia and Alabama. (Church Decl. ¶3.) Rent-A-Center rents merchandise, which it

owns, to customers on a rent-to-own basis. *Id.* at ¶4. The merchandise comes from existing stock or through its merchandise catalog. (Hutson Dep. at 40.) When merchandise is ordered from the catalog, it is shipped directly to the store from a vendor, almost all of which are located almost exclusively outside the state of Georgia. (Church Decl. ¶8.) The merchandise is delivered by Rent-A-Center employees in Rent-A-Center trucks to customers in Georgia and Alabama. *Id.* at ¶6.

Plaintiff, Scott Hutson, was employed by Rent-A-Center in Columbus, Georgia from March 1998 until February 2001. (Hutson Dep. at 17.) The stores at which Plaintiff worked had customers in Georgia and Alabama. *Id.* at 52, 56. Plaintiff was hired as an Account Manager. As an Account Manager, Plaintiff "spent a substantial portion of his time transporting furniture and appliances to the homes of customers of the Defendant's 'rent to own' business." (Pl.'s Br. in Opp. to Def.'s Mot. for Summ. J. at 6.) Plaintiff received a promotion and became an "Inside Outside Manager" from October 16, 1999 until February 3, 2000. Plaintiff testified that as an Inside Outside Manager, he still made deliveries "on average about twice . . . a week." (Hutson Dep. at 72-73.) Plaintiff resumed his "Account Manager" position on February 3, 2000. *Id.* at 76.

On November 13, 2000, Plaintiff sued Rent-A-Center alleging violations of the overtime pay provisions of the Fair Labor Standards Act ("FLSA").

Appendix B

II. CONCLUSIONS OF LAW

A. Summary Judgment Standard

"[T]he plain language of Federal Rule of Civil Procedure 56(c) mandates the entry of summary judgment, after adequate time and discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552 (1986). The nonmoving party must put forth more than a "mere 'scintilla'" of evidence; "there must be enough of a showing that the jury could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990).

A district court "can only grant summary judgment 'if *everything* in the record . . . demonstrates that no genuine issue of material fact exists.'" *Tippens v. Celotex Corp.*, 805 F.2d 949, 952 (11th Cir. 1986) (emphasis in original) (citation omitted). Genuine disputes are those where the evidence is such that a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby*, 106 S. Ct. 2505, 2512 (1986).

In deciding whether a genuine factual issues exist, the court must accept the truth of Plaintiff's evidence and must draw all reasonable inferences in Plaintiff's favor. *Cottrell v. Caldwell*, 85 F.3d 1480, 1486 n.3 (11th Cir. 1996). The court may not weigh conflicting evidence or make credibility determinations. *Hairston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 919 (11th Cir. 1993).

Appendix B

B. Fair Labor Standards Act

The Fair Labor Standards Act of 1938 ("FLSA") established minimum labor standards in order to eradicate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C.A. § 202(a) (1998). Under Section 7 of the FLSA, covered employees, which include those engaged in commerce or in the production of goods for commerce, must be paid the minimum wage for each hour worked and must be paid at one and one-half times their regular rate of pay for hours worked in excess of forty in a workweek. 29 U.S.C.A. §§ 206, 207. In Plaintiff's Complaint, Plaintiff alleges that he is entitled to receive overtime pay for each week in which he worked more than forty hours. (Compl. ¶3.)

1. Overtime Exemption — Section 13(b)(1)

Defendant argues that Plaintiff is exempt from the overtime provisions, pursuant to Section 13(b)(1) of the Fair Labor Standards Act, which provides an exemption from the maximum hours and overtime pay requirements of Section 7 of the Act. An employee is exempt if he is an "employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49." 29 U.S.C.A. § 213(b)(1).

The three elements to the Section 13(b)(1) exemption are (1) the employee must be employed by a motor carrier, (2) the employee must affect highway safety, and

(3) the employee's activities must involve the interstate transportation of goods. 29 C.F.R. § 782.2 (2001); *Baez v. Wells Fargo Armored Serv. Corp.*, 938 F.2d 180, 181-82 (11th Cir. 1991).

a. Rent-A-Center is a Motor Carrier

Title 29 U.S.C.A. § 213(b)(1) refers to the Secretary of Transportation's power pursuant to 49 U.S.C.A. § 31502. Section 31502 states:

> (a) Application. — This section applies to transportation —
>
> (1) described in sections 13501[1] and 13502 of this title.
>
> (b) Motor carrier and private motor carrier requirements. — The Secretary of Transportation may prescribe requirements for —
>
> (1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and

---

1. Title 49, U.S.C.A. § 13501 provides: "The Secretary and the Board have jurisdiction, as specified in this part, over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier (1) between a place in (A) a State and a place in another State; (B) a State and another place in the same State through another State . . ."

> (2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation.

Thus, the Secretary of Transportation has the power to regulate employees of motor carriers whose duties affect safety on the highways when interstate shipments of property are involved. 49 U.S.C.A. §§ 31501, 31502. Title 49 U.S.C.A. § 13102(13) defines "motor private carrier:"

> The term "motor private carrier" means a person, other than a motor carrier, transporting property by motor vehicle when —
>
> > (A) the transportation is as provided in section 13501 of this title;
> >
> > (B) the person is the owner, lessee, or bailee of the property being transported; and
> >
> > (C) the property is being transported for sale, lease, rent, or bailment or to further a commercial enterprise.

Rent-A-Center rents merchandise, which it owns, to customers on a rent-to-own basis. Rent-A-Center delivers merchandise from its store in Columbus, Georgia to its customers. These deliveries include deliveries in Phenix City, Alabama. (Hutson Dep. at 73-74.) Since Rent-A-Center transports property which it owns across state lines in

furtherance of its commercial enterprise, the Court finds that Rent-A-Center is a motor carrier.

b. Plaintiff's Duties Affect Highway Safety

At all times during his employment, Plaintiff's job duties included making deliveries as a driver, in Rent-A-Center trucks, to customers in Georgia and Alabama. (Hutson Dep. at 55, 56, 73, 74.) As an Account Manager, he spent a "substantial" portion of his time making deliveries. When he became an Inside Outside Manager, the number of deliveries he made decreased; however, he still made deliveries, though not as frequently as when he was an Account Manager. Plaintiff testified that as an Inside Outside Manager, he made deliveries "on average about twice . . . a week." (Hutson Dep. at 72-73.)

The Supreme Court has specifically ruled that drivers affect highway safety. *See Levinson v. Spector Motor Serv.*, 67 S. Ct. 931 (1947); *Morris v. McComb*, 68 S. Ct. 131, 137 (1947); 29 C.F.R. § 782.2(b)(2) (2001). Thus, since Plaintiff was a driver, he was engaged in safety affecting activities.

Plaintiff argues that, as an Inside Outside Manager, the exemption does not apply to him. (Pl.'s Br. in Opp. to Def.'s Mot. for Summ. J. at 6.) Plaintiff refers to *Pyramid Motor Freight Corp. v. Ispass*, 67 S. Ct. 954, 960 (1947), where the Court found a *de minimis* exception to the application of the Motor Carrier Act. In *Pyramid*, the Court held that persons who only handle freight before or after loading perform tasks that may be too "trivial, casual, or occasional" to affect safety and bring them under the Motor Carrier Act's authority. *Id.*

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The workers in *Pyramid* are distinguishable from Plaintiff. In *Pyramid*, the workers were loaders who did not drive in interstate commerce. Here, the Plaintiff was a driver, even during the time he worked as an Inside Outside Manager. The former Fifth Circuit affirmed a decision that held that the *Pyramid de minimis* exception does not apply to drivers: "the *de minimis* rule should seldom, if ever, be applied to one who drives a motor vehicle carrying property of a private carrier in interstate commerce." *Sinclair v. Beacon Gasoline Co.*, 447 F. Supp. 5, 11 (W.D. La. 1976), *aff'd*, 571 F.2d 978 (5th Cir. 1978).

The Court recognizes that the Plaintiff did not make as many deliveries during the time he was employed as an Inside Outside Manager. However, he still made deliveries approximately twice a week, and therefore still falls within the exemption:

> As a general rule, if the bona fide duties of the job performed by the employee are in fact such that he is (or, in the case of a member of a group of drivers, driver's helpers, loaders, or mechanics employed by a common carrier and engaged in safety-affecting occupations, that he is likely to be) called upon in the ordinary course of his work to perform, either regularly or from time to time, safety-affecting activities of the character described in paragraph (b)(2) of this paragraph, he comes within the exemption in all workweeks when he is employed at such job. This general rule assumes that the activities involved in the continuing duties of the job in all such workweeks

> will include activities which have been determined to affect directly the safety of operation of motor vehicles on the public highways in transportation in interstate commerce. Where this is the case, the rule applies regardless of the proportion of the employee's time or of his activities which is actually devoted to such safety-affecting work in the particular workweek, and the exemption will be applicable even in a workweek when the employee happens to perform no work directly affecting "safety of operation."

29 C.F.R. § 782.2(b)(3) (2001).

This Court has formerly addressed a similar argument. In *Webb v. Athens Newspapers, Inc.*, 999 F. Supp. 1464, 1472 (M.D. Ga. 1998), the Court rejected the argument that 13(b)(1) activities must be a "substantial" part of the employee's duties. The Court followed the Supreme Court's decision in *Levinson*, stating that "[i]t is the character of the activities rather than the proportion of either the employee's time or of his activities that determines the actual need for the Commission's power." *Id.* (quoting *Levinson*, 67 S. Ct. at 944).

Based on these reasons, the Court finds that Plaintiff's job duties included being a driver, and as a driver he affects highway safety, and thus he meets the second prong of the Section 13(b)(1) exemption.

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c. Plaintiff's Activities Involved the Interstate Transportation of Goods

A minor involvement in interstate commerce as a regular part on an employee's duties will subject that employee to the jurisdiction of the Department of Transportation. *Morris*, 68 S. Ct. at 136; *Starrett v. Bruce*, 391 F.2d 320, 323 (10th Cir. 1968), *cert. den.*, 89 S. Ct. 404 (1968).

At all times during Plaintiff's employment with Rent-A-Center, he made deliveries as a driver to customers in Georgia and Alabama. (Hutson Dep. at 55, 56, 73, 74.)

In addition to driving goods across state lines, Plaintiff also made intrastate deliveries of goods ordered from out-of-state vendors. Plaintiff made intrastate deliveries of goods which had been specially ordered from out of state for Rent-A-Center customers. (Hutson Dep. at 41-43.) This intrastate delivery also renders him exempt from the overtime provisions of the Fair Labor Standards Act: "To be subject to the Secretary of Transportation's jurisdiction pursuant to the Motor Carrier Act, a motor carrier must be engaged in interstate commerce, which requires either the actual transport of goods across state lines or the intrastate transport of goods in the flow of interstate commerce." *Barefoot v. Mid-America Dairymen, Inc.*, 826 F. Supp. 1046, 1049 (N.D. Tex. 1993) (citing *Merchants Fast Motor Lines, Inc. v. I.C.C.*, 528 F.2d 1042, 1044 (5th Cir. 1976)).

Plaintiff's activities — both intrastate and interstate — render him exempt from the overtime provisions of the FLSA.[2]

2. Plaintiff attempts to defeat Defendant's Motion for Summary Judgment by arguing that the 13(b)(1) exemption does not apply to (Cont'd)

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2. Plaintiff's Minimum Wage Argument

Plaintiff's Complaint states a claim for overtime violations, not minimum wage violations. The relevant portions of Plaintiff's Complaint provides:

> Plaintiff was employed by Defendant during the above times at work weeks of more than 40 hours without compensating him for employment in excess of 40 hours at the rate of not less than one and one-half times the regular rate at which he should have been employed, contrary to Section 7 of the Act.

(Compl.¶3.) The Complaint mentions Section 6: "As a result of said violations of Sections 6 and 7 of the Act . . ." (Compl.¶4); however the only "said violations" in the Complaint address overtime pay under Section 7, which does not include minimum wage violations.

The Federal Rules of Civil Procedure establish the standard for pleadings:

> Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a

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(Cont'd)

Defendant's employees since Rent-A-Center's primary business is not transportation. This argument is unfounded and not supported by any case law. In fact, it is contradictory to this Court's decision in *Webb v. Athens Newspapers, Inc.*, 999 F. Supp. 1464, 1472 (M.D. Ga. 1998), where this Court held 13(b)(1) provided an exemption to an employee of a newspaper company that was not primarily involved in transportation.

> short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks . . .

Fed. R. Civ. Pro. 8(a). Plaintiff's Complaint does not contain a statement showing he is entitled to unpaid minimum wages. In Plaintiff's Brief in Opposition to Motion for Summary Judgment, Plaintiff argues that he alleged a violation of Section 6 in his Complaint and testified in his deposition that "no payment for overtime was made, even as to minimum wage." (Pl.'s Br. in Opp. to Mot. for Summ. J. at 2.) However, this statement, which was in a Reply to Defendant's Motion for Summary Judgment, is insufficient. Not only is it not a part of the pleadings, it does not show that the Plaintiff is entitled to the "unpaid minimum wage." Plaintiff has failed to produce any evidence establishing that his hourly wages were below the minimum wage. Though Plaintiff's Brief is unclear, Plaintiff seems to assume that for each hour worked in excess of forty in a week, he is entitled to receive a minimum wage payment for the hours over forty per week, regardless of what he was paid for the other forty hours. This reasoning is flawed, shown by Section 30b02 of the *Field Operations Handbook*[3] which provides: "if the employee's total earning for the w/w

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3. The U.S. Department of Labor's Wage and Hour Division enforces the Fair Labor Standards Act. *See* 29 U.S.C.A. § 204(a). The Wage and Hour Division has issued instructions to its enforcement staff in its *Field Operations Handbook.* (Tab C to Def.'s Reply to Pl's Brief in Opp'n to Mot. for Summ. J.)

[workweek] . . . divided by the compensable hours equals or exceeds the applicable MW [minimum wage], the employee has been paid in compliance with Sec 6." Wage-Hour *Field Operations Handbook*, § 30b02, 12/9/88. Plaintiff has not produced any evidence showing that his total earnings are less than what he would have received if he had been paid the minimum wage for every hour worked.[4] Thus, the Court denies Plaintiff's claim that he is entitled to minimum wage payment and grants Defendant's Motion for Summary Judgment.

C. Plaintiff's Motion to Amend his Complaint

On August 15, 2001, Plaintiff filed a Motion requesting that this Court allow an amendment to his Complaint.

Federal Rule of Civil Procedure 15(a) provides that leave to amend a complaint shall be freely given when justice so requires. In considering whether or not to grant an amendment, a court should consider whether there has been undue delay in filing, bad faith or dilatory motives, prejudice to the opposing parties, and the futility of the amendment.

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4. Plaintiff testified that as an Account Manager he was paid an hourly rate ranging from $12.00 per hour to $13.00 per hour. While he was an Inside Outside Manager, he had an annual salary of $31,000. (Hutson Dep. at 86-87.) Thus, at all times during Plaintiff's employment with Rent-A- Center, his hourly rate was more than twice the applicable minimum wage. As the Defendant's pointed out in its Reply to Plaintiff's Brief in Opposition to Motion for Summary Judgment, Plaintiff would have had to have worked between 93 to 100 hours per week in order to have his average hourly wages below $5.15 per hour. (Def.'s Reply at 12.) Plaintiff has not made such allegations.

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Local 472 of United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Indus. of U.S. and Canada v. Georgia Power Co., 684 F.2d 721, 724 (11th Cir. 1982).

Plaintiff's proposed amendment is untimely. It was filed ten months after Plaintiff's original Complaint was filed in this Court, two months after the close of discovery, and one month after Defendant moved for summary judgment. The Plaintiff has presented no explanation as to why the Court should overlook this delay. Though not binding on this Court, the Court notes that the Seventh Circuit has held that a district court judge has discretion to deny such an amendment: "when an amendment to a complaint is proposed after the defendant has moved for summary judgment, the plaintiff must show that the amendment is supported by 'substantial and convincing evidence'." *Cowen v. Bank United of Texas, FSB*, 70 F.3d 937, 944 (7th Cir. 1995). *See also Parish v. Frazier*, 195 F.3d 761, 764 (5th Cir. 1999) (holding plaintiff bears the burden of showing that delay was due to oversight, inadvertence or excusable neglect).

The Amended Complaint does not allege a new cause of action or reflect any newly discovered facts revealed during the course of discovery which might warrant an amendment. *See Nat'l Serv. Indus., Inc. v. Vafla Corp.*, 694 F.2d 246, 249 (11th Cir. 1982) (no abuse of discretion to deny leave to amend pleading where party knew of facts supporting proposed amendment when it filed original pleading).

Plaintiff's Amended Complaint seeks to make this case a class action with the Plaintiff as the representative of the class. (Amended Compl. ¶6.) Allowing this amendment

would result in undue prejudice to the Defendant. Discovery closed on June 8, 2001; none of the discovery conducted by Defendant was designed to defend a class action. To allow a class action at this time would unfairly require the Defendant to conduct additional discovery and to revisit and supplement already completed discovery. *See Campbell v. Emory Clinic*, 166 F.3d 1157, 1162 (11th Cir. 1999) ("Prejudice and undue delay are inherent in an amendment asserted after the close of discovery and after dispositive motions have been filed, briefed, and decided.")

Based on these considerations, the Court denies Plaintiff's request to amend his Complaint.

III. CONCLUSION

Defendant's Motion for Summary Judgment (Tab #10) is **GRANTED** and Plaintiff's Motion to Allow Amendment (Tab #15) is **DENIED.**

SO ORDERED, this the 11th day of December, 2001.

s/ Hugh Lawson
HUGH LAWSON, Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 19, 2002

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 01-17261-II

R. SCOTT HUTSON,

Plaintiff-Appellant,

versus

RENT-A-CENTER, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____F.2d____).

Before: CARNES, HULL and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the

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Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
NOV 21 2002
CLERK

No. 02-605

IN THE

Supreme Court of the United States

R. SCOTT HUTSON,
Petitioner,

v.

RENT-A-CENTER, INC.,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondent Rent-A-Center, Inc. has no parent corporation, and there are no publicly traded companies that own 10% or more of Respondent's stock.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Rent-A-Center, Inc. respectfully suggests that the Court should deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit.

STATEMENT OF THE CASE

As does Petitioner, Respondent adopts the District Court's Findings of Fact as a sufficient Statement of the Case for the purposes of this Petition. The District Court's Opinion is published at 209 F. Supp.2d 1353 (M.D. Ga. 2001).

REASONS FOR DENYING THE PETITION

The sole question presented by the Petition is whether employees of "motor private carriers" are subject to the jurisdiction of the Secretary of Transportation and, therefore, are exempt from overtime pay under the Fair Labor Standards Act ("FLSA") Section 29 U.S.C. 213(b)(1) ("13(b)(1)"). Petitioner argues that the Eleventh Circuit Court of Appeals and the District Court erred because "case law precedent by this Court or by statutory enactment" has never included the Secretary's jurisdiction over "motor private carriers". (Petitioner's Brief at i). Contrary to Petitioner's assertion, Congress has explicitly authorized the Secretary of Transportation to establish qualifications and maximum hours of service for employees of "motor private carriers." 49 U.S.C. §31502. Moreover, courts throughout the United States have uniformly applied the Section 13(b)(1) exemption to motor private carriers – carriers whose primary business is not transportation.

Neither the Eleventh Circuit's unpublished opinion nor the Middle District of Georgia's published opinion conflicts with any statutory authority or caselaw. Each

United States Court of Appeals that has addressed this specific issue has ruled that "motor private carriers" are entitled to the exemption. No precedent from this Court or any statutory authority conflicts with the ruling of the lower courts. In short, Petitioner has presented no genuine conflict between the Circuits to be resolved by this Court, nor has Petitioner shown that the Eleventh Circuit has decided an important question of federal law that should be addressed by this Court. The Eleventh Circuit's ruling was proper in all respects, and was consistent with the decisions of the other Circuits and of this Court. Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

I.
THE ELEVENTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH ANY CASELAW FROM ANY COURT OR WITH ANY STATUTORY AUTHORITY

Petitioner argues that the Eleventh Circuit's ruling is based on no caselaw or statutory authority and contradicts precedent from this Court. In making this argument, Petitioner simply ignores significant authority and caselaw considered and cited by the Courts below, and in so doing seriously misleads the Court.

A. The Eleventh Circuit Opinion Does Not Conflict with Any Caselaw.

Apart from Petitioner's unsupported declaration, he can offer no authority that supports his position or conflicts with the caselaw that supports Respondent's position. FLSA Section 13(b)(1) – the motor carrier exemption[1] – exempts from the overtime requirements

[1] The 13(b)(1) exemption and the "motor carrier exemption" are used interchangeably by the Courts and throughout this brief.

of the FLSA those employees "with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 31502 of Title 49..." 29 U.S.C. §213(b)(1).

Courts throughout the United States have uniformly applied the motor carrier exemption to motor private carriers - carriers whose primary business is not transportation.[2] *Opellika Royal Crown Bottling Co. v. Goldberg*, 299 F.2d 37, 42-43 (5th Cir. 1962) (driver-salesman for beverage distributor exempt pursuant to 13(b)(1)); *Griffin v. Cosolidated Foods Corp.*, 771 F.2d 826, 827-28 (4th Cir. 1985) (driver salesman for panty hose manufacturer and distributor exempt pursuant to 13(b)(1); *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1026 (10th Cir. 1992), *cert. denied*, 506 U.S. 1013 (1992) (route drivers for beverage bottling company exempt pursuant to 13(b)(1)); *Friedrich v. U.S. Computer Svc's.*, 974 F.2d 409, 419 (3d Cir. 1992) (computer field engineers who drive passenger cars with tools and equipment in interstate commerce are subject to the Secretary of Transportation's jurisdiction and are therefore exempt from overtime pursuant to 13(b)(1)); *Klitzke v. Steiner Corp.*, 110 F.3d 1465, 1467-69 (9th Cir. 1997) (delivery drivers for linen distributor exempt pursuant to 13(b)(1)); *Bilyou v. Duchess Beer Distrib., Inc.*, 300 F.3d 217, 225 (2d Cir. 2002) (route driver for beverage distributor exempt pursuant to 13(b)(1)); *Sinclair v. Beacon Gasoline Co.*, 447 F. Supp. 5, 10 (W.D. La. 1976), *aff'd*, 571 F.2d 978 (5th Cir. 1978) (employees of natural gas well servicing company who drive tools and equipment in company-furnished pick-up trucks in interstate commerce exempt pursuant to

[2] In addition to these cases, many other decisions of the Courts of Appeal and District Courts have applied the 13(b)(1) exemption to motor private carriers.

13(b)(1)); *Webb v. Athens Newspapers, Inc.*, 999 F. Supp. 1464, 1468 (M.D. Ga. 1998) (newspaper delivery drivers are exempt pursuant to 13(b)(1)); *McGuiggan v. CPC Int'l Inc.*, 84 F. Supp.2d 470, 482 (S.D.N.Y. 2000) (delivery drivers for bakery products distributor exempt pursuant to 13(b)(1)).

Petitioner's Brief does not identify even one case that conflicts with the holdings of those cases that have applied the overtime exemption to "motor private carriers". Therefore, it is evident that no conflict exists between the instant Eleventh Circuit opinion and that of any other Circuit.

B. The Eleventh Circuit Opinion Does Not Conflict with *Brooks* or *Red Ball*.

Petitioner attributes new and remarkable meanings to this Court's ruling in *Red Ball Motor Freight, Inc. v. Shannon*, 377 U.S. 311 (1964) and the district court's ruling in *Brooks Transp. Co., Inc. v. U.S.*, 93 F. Supp. 517 (E.D. Va. 1950), *aff'd*, 340 U.S. 925 (1951), in a failed attempt to create conflict where none exists. These cases do not support Petitioner's position, nor do they create any conflict whatsoever.

Both Petitioner and Respondent agree that the question presented concerns whether "motor private carriers"[3] are subject to the motor carrier exemption to the FLSA. Neither *Brooks* or *Red Ball* mentions the Fair Labor Standards Act, overtime, or exemption from overtime. Specifically, they do not address the 13(b)(1) exemption from overtime. Rather, the *Brooks* and *Red Ball* cases address whether motor private carriers are subject to Interstate Commerce Commission ("ICC")

[3] The terms "private motor carrier" and "motor private carrier" have the identical meaning and are used interchangeably in the relevant statutes. *See* 49 U.S.C. §31502(b).

regulation (*e.g.*, licenses and permits). These decisions merely hold that the ICC (now Surface Transportation Board ("STB")) does not have jurisdiction over motor private carriers for purposes of regulation (i.e., licenses and permit requirements).

The cases cited by Petitioner merely hold that motor private carriers are eligible for a "primary business" exemption from the Secretary of Transportation's regulatory burden such as licensing and permit requirements. However, Petitioner misconstrues these cases and wrongly concludes that the "primary business" exemption of 49 U.S.C. §13505 [formerly §10524] also denies the Secretary of Transportation the power to establish qualifications and maximum hours of service of employees when needed to promote safety of operation – despite the fact that an entirely separate section of the Motor Carrier Act explicitly grants such authority to the Secretary of Transportation (49 U.S.C. §31502) and makes it applicable to motor private carriers like Rent-A-Center.[4]

C. Statutory Authority Supports Respondent's Position Without Conflict.

Petitioner fails to bring to the Court's attention 49 U.S.C. §31502 — the statutory provision that explicitly grants the Secretary of Transportation the authority to

---

[4] The term "motor private carrier" means a person, other than a motor carrier, transporting property by motor vehicle when

> (A) the transportation is as provided in section 13501 of this title;
>
> (B) the person is the owner, lessee, or bailee of the property being transported; and
>
> (C) the property is being transported for sale, lease, rent, or bailment or to further a commercial enterprise.

49 U.S.C. §13102(13).

prescribe requirements for qualifications and maximum hours of service for employees of "motor private carriers" (49 U.S.C. §31502).

The FLSA overtime exemption in Section 13(b)(1) refers to employees over whom the Secretary of Transportation has the "power to establish qualifications and maximum hours of service pursuant to the provisions of Section 31502 of Title 49." Section 31502 states in part:

> (a) Application.-This section applies to transportation-
>
> (1) described in sections 13501[5] and 13502 of this title...
>
> * * * * *
>
> (b) Motor carrier and **private motor carrier** requirements.-The Secretary of Transportation may prescribe requirements for-
>
> (1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and
>
> (2) qualifications and maximum hours of service of employees of, and standards of equipment of, a **motor private carrier**, when needed to promote safety of operation.

49 U.S.C. §31502(a), (b) [emphasis supplied]

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[5] Title 49 U.S.C. §13501 provides in part: "The Secretary and the [Surface Transportation] Board have jurisdiction, as specified in this part, over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier (1) between a place in (A) a State and a place in another State; (B) a State and another place in the same State through another State..."

Thus, Congress has specifically delegated to the Secretary of Transportation the power to regulate employees of motor carriers and motor private carriers whose duties affect safety on the highways when interstate shipments of property are involved. 49 U.S.C. §31502.

In the face of this explicit statutory language, Petitioner argues that 49 U.S.C. §13505 (and its predecessor §10524) excludes employees of motor private carriers from the 13(b)(1) exemption. The "primary business" test of §13505 and its predecessor §10524, however, merely applies to licensing, permit and certificate requirements. *Friedrich*, 974 F.2d at 413 (*citing Ryder Truck Lines, Inc. v. U.S.*, 716 F.2d 1369, 1373, n.4 (11th Cir. 1983), cert. denied, 466 U.S. 927 (1984)); *Klitzke*, 110 F.3d at 1468; *Bilyou,* 300 F.3d at 226.

Petitioner cites no authority that supports his interpretation of §13505. All the Courts of Appeals that have addressed this specific issue have uniformly held that Section 10524 (now Section 13505) has no effect on the overtime exemption under 13(b)(1).

In *Friedrich,* the Third Circuit rejected the very argument Petitioner makes here:

> Section 10524(a) has no application in this case. The section merely exempts motor private carriers from the licensing, permit, and certificate requirements imposed upon motor carriers by the ICC pursuant to 49 U.S.C. §§ 10921-10935; *it does not serve to deprive the DOT of its power to regulate the qualifications and maximum hours of service of employees of a motor private carrier pursuant to 49 U.S.C. §3102(b)(2).*[6]

Friedrich, 974 F.2d at 413. [emphasis supplied]

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[6] 49 U.S.C. §3102 was recodified at 49 U.S.C. §31502 in 1996.

In *Klitzke,* the Ninth Circuit also rejected Petitioner's faulty hypothesis:

> The subchapter to which it refers deals only with regulation by the ICC. *See* 49 U.S.C. §10521. Thus, "the section [10524, now 13505] merely exempts motor private carriers from the licensing, permit and certificate requirements imposed upon motor carriers by the ICC pursuant to 49 U.S.C. 10921-10935; *it does not serve to deprive the [Department of Transportation] of its power to regulate the qualifications and maximum hours of service of employees of motor private* carriers pursuant to 49 U.S.C. §3102(b)(2)."

Klitzke, 110 F.3d at 1468 [emphasis supplied] (*quoting Friedrich,* 974 F.2d at 413).

D. The Recodification of § 10524 Has Been Addressed By the Courts Without Conflict.

Petitioner's assertion that the recodification of §10524 in 1996 somehow changes the analysis of the 13(b)(1) exemption as it applies to motor private carriers has been explicitly rejected. Petitioner represents to this Court that no court has addressed this issue since the recodification. This assertion is simply not true.

The *Klitzke* Court issued its opinion in 1997 after the recodification of §10524 and the Court specifically recognized that §10524 was recodified as §13505.[7] Moreover, the *Klitzke* court specifically held that the change

[7] Where Congress reenacts a statute without substantive change, it generally is presumed to be aware of and to adopt any administrative or judicial interpretations by reenactment. *See Lorillard v. Pons,* 434 U.S. 575, 580-81 (1978); *See also Helvering v. R.J. Reynolds Tobacco Co.,* 306 U.S. 110, 115 (1939) (Reenactment without change gives such interpretations the force of law).

and reenactment would not have affected the outcome of the case. *Id.* at 1467 n. 2, 1468 n.5. Thus, Petitioner's argument that the 1996 recodification of §10524 as §13505 changes the previous analysis of the Courts was specifically rejected by *Klitzke*.

Recently, the United States Court of Appeals for the Second Circuit thoroughly addressed and rejected Petitioner's position upon which this appeal is premised. In *Bilyou v. Duchess Beer Distrib., Inc.*, 300 F.3d 217 (2d Cir. 2002), the Court specifically held that Section 13505 has no bearing on the overtime exemption under 13(b)(1).

> On the basis of [Defendant's] involvement in another primary business other than transportation, §13505 exempts it from the Secretary's jurisdiction, as specified "*in this part,* over transportation of property by motor vehicle." 49 U.S.C. §13505 (emphasis added). Section 13505 is a provision of Part B of Subtitle IV of Title 49, 49 U.S.C. §§ 13101-14914. That Part contains provisions authorizing the DOT to enact registration and security (insurance and bonding) requirements for motor carriers, freight forwarders, and brokers. *See* 49 U.S.C. §13902 (registration requirements for motor carriers); §13903 (registration requirements for freight forwarders); §13904 (registration requirements for brokers); *see also* §13906 (bonding and insurance requirements for motor carriers, freight forwarders, and brokers).
>
> Section 13505 has no bearing on the Secretary's power, as described in 29 U.S.C. §213(b)(1), "to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49." Section 31502 falls under a different part of Title 49. It falls in Part B of Subtitle VI

> relating to "Motor Vehicle and Driver Programs." The fact that § 13505 denies the Secretary power to prescribe economic and licensing regulations of the sort covered in Subtitle IV, Part B, in no way contradicts the Secretary's authority, established in a different part of the Motor Carrier Act, to set qualifications and maximum hours of service for drivers to promote safety of operations. That is the crucial inquiry under FLSA's §213(b)(1), and, as shown above, [Defendant] satisfies those criteria.

Bilyou, 300 F.3d at 226.[8]

Therefore, the Third, Ninth, and Second Circuits, and now the Eleventh Circuit in the instant matter, have explicitly and uniformly rejected Petitioner's faulty premise. There is no conflict whatsoever between the Circuits on this issue.

II.
PETITIONER'S FAILURE TO PRESENT HIS POSITION WITH ACCURACY IS SUFFICIENT REASON FOR THE COURT TO DENY HIS PETITION

Supreme Court Rule 14.4 states that "[t]he failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition." Here, Petitioner has presented deceptive and inaccurate arguments to the Court.

In his Petition, Petitioner fails even to mention 49 U.S.C. §31502, which explicitly grants authority to the

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[8] *See Bilyou*, 300 F.3d at 226-229 for an excellent discussion of the history and purpose of the precursor provisions of the Motor Carrier Act.

Secretary of Transportation to establish qualifications and maximum hour requirements for employees of motor private carriers. This section is essential to an adequate understanding of the issues relevant to this case, yet Petitioner inexcusably makes no mention of this statute whatsoever. Instead, Petitioner cites to 49 U.S.C. §13505, which he incorrectly represents as the relevant statutory provision.

Petitioner's statement that the District Court opinion in the instant case deviates from statutory and caselaw authority (*See* Petitioner's Brief at i, 4, 11) is simply wrong. As stated above, the courts have uniformly applied the 13(b)(1) exemption to motor private carriers.

Finally, Petitioner's assertion (*See* Petitioner's Brief at p.8) that courts have not analyzed the exemption since the recodification of §10524 is completely untrue. The Ninth Circuit addressed the effect of the recodification in *Klitzke*, 110 F.3d at 1467 n.2, 1468 n.5, which holding Petitioner misrepresents. Most recently the Second Circuit in *Bilyou* specifically addressed this Petitioner's argument, and rejected it completely, *Bilyou*, 300 F.3d at 225-229, which Petitioner simply ignores.

Obviously Petitioner did not accurately present the Court with "whatever is essential to ready and adequate understanding of the points requiring consideration." Therefore, this failure alone is "sufficient reason for the Court to deny..." the Petition. SUP. CT. R. 14.4.

III.
PETITIONER HAS ABANDONED HIS APPEAL OF THE LOWER COURTS' DENIAL OF PETITIONER'S MOTION TO AMEND

The District Court denied Petitioner's motion to

amend his complaint to add class allegations. The Eleventh Circuit affirmed. Petitioner makes sporadic comments throughout his Brief in Support of his Petition about this refusal to permit amendment but does not present it as a "Question Presented" for this Court to consider. Therefore, Petitioner has abandoned this claim. SUP. CT. R. 14.1(a). In any event, Petitioner has presented no reasons why the lower courts' denial of his motion was error.

IV.
CONCLUSION

For the foregoing reasons, Respondent prays that Petitioner's petition for a writ of certiorari be denied.

Respectfully submitted,

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